

STATE OF MICHIGAN  
IN THE SUPREME COURT

FRANK  
WILLIAM WARD,

OK

Plaintiff-Appellee,

vs.

CONSOLIDATED RAIL CORPORATION,  
d/b/a Conrail, ~~a Pennsylvania corporation,~~

Supreme Court No.:

Court of Appeals No.: 234619 *Open 8/7/03*

Wayne County Circuit

Court No.:99-903048-NO

Defendant-Appellant.

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NOTICE OF HEARING

APPLICATION FOR LEAVE TO APPEAL ON BEHALF OF DEFENDANT  
CONSOLIDATED RAIL CORPORATION

CERTIFICATE OF SERVICE

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**APPLICATION FOR LEAVE TO APPEAL ON BEHALF OF DEFENDANT**  
**CONSOLIDATED RAIL CORPORATION**

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**STATEMENT IDENTIFYING JUDGMENT AND ORDERS APPEALED FROM AND  
RELIEF SOUGHT**

Defendant, Consolidated Rail Corporation, appeals from the unpublished per curiam opinion of the Michigan Court of Appeals dated August 7, 2003, affirming the March 31, 2000 pretrial “presumption” ruling of the trial court, the January 5, 2001 judgment entered by the trial court, the March 16, 2001 order of the trial court awarding plaintiff attorney fees under MCR 2.403, and the May 10, 2001 order of the trial court denying defendant’s motion for new trial or in the alternative judgment notwithstanding the verdict.

Consolidated Rail Corporation requests that this Court reverse the decision of the Court of Appeals (except with regard to the ruling eliminating paralegal fees) and enter judgment in favor of defendant, or in the alternative, grant a new trial on all issues.

## **STATEMENT OF QUESTIONS PRESENTED FOR REVIEW**

- I. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REGARD TO ITS PRETRIAL PRESUMPTION RULING AND PRESUMPTION/INFERENCE INSTRUCTION AT THE CLOSE OF TRIAL.
  - A. Whether Given The Absence Of Any Intentional Fraudulent Conduct And Intentional Destruction Of Evidence By Defendant, Plaintiff Was Not Entitled To A Presumption The Handbrake Was Defective.
  - B. Whether The Trial Court Committed Reversible Error In Failing To Completely Instruct The Jury Consistent With SJI 2d 6.01(c).
  - C. Whether A Failure To Produce Evidence Instruction Is Improper Where Equipment Involved In A Claimed Accident Has Been Returned To Regular Service After Being Found Free Of Any Defect And The Equipment Is Later Replaced For Other Reasons.
- II. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO ENTER JUDGMENT IN FAVOR OF DEFENDANT OR IN THE ALTERNATIVE FINDING THAT THE JURY VERDICT WAS SO INCONSISTENT THAT A NEW TRIAL WAS REQUIRED.
- III. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO ENTER JUDGMENT FOR DEFENDANT OR IN THE ALTERNATIVE THE JURY'S VERDICT WAS AGAINST THE GREAT WEIGHT OF THE EVIDENCE IN REGARD TO THE ADMISSION OF EVIDENCE THAT PLAINTIFF'S SUBSEQUENT SURGERY AND CLAIMED DISABILITY WERE CAUSED BY HIS FEBRUARY 19, 1998 ACCIDENT.
- IV. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REGARD TO ITS POST-TRIAL RULING GRANTING ATTORNEY FEES TO PLAINTIFF WHICH ARE NOT RECOVERABLE IN AN ACTION UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT.

With respect to each of the foregoing questions:

The Trial Court Answered "NO"

The Court of Appeals Answered "NO"

Defendant-Appellee Answers "YES"

**STATEMENT OF GROUNDS IN SUPPORT OF APPLICATION FOR  
LEAVE TO APPEAL AND SUMMARY OF ARGUMENT**

I. Defendant submits that pursuant to MCR 7.302 (B)(5) the opinion of the Court of Appeals regarding the presumption ruling of the trial court is clearly erroneous and will cause material injustice if not addressed by this Court. Further, the opinion of the Court of Appeals conflicts with prior decisions of the Michigan Supreme Court in *Trupiano v. Cully*, 349 Mich. 568; 84 N.W. 2d 747 (1957) and the Michigan Court of Appeals in *Lagalo v. Allied Corporation* (On Remand), 233 Mich. App. 514, 592 N.W. 2d 786 (1991) which hold that an adverse presumption applies to non-produced evidence only where there is evidence of intentional fraudulent conduct and intentional destruction of evidence. The opinion of the Court of Appeals also conflicts with the prior decision of this Court in *Widmayer v. Leonard*, 422 Mich. App. 280, 373 N.W. 2d 538 (1985) and the Michigan Court of Appeals in *State Farm Mutual Automobile Ins. Co. v. Allen, et al.*, 191 Mich. App. 18, 477 N.W. 2d 445 (1991) which hold that a jury should not be informed of the existence of a presumption.

Defendant additionally submits that the opinion of the Court of Appeals conflicts with *Chastain v. GMC* (On Remand), 254 Mich. App. 576, 657 N.W. 2d 804 (2002) and MCR 2.516 (D)(2) which hold that a trial court must give a standard jury instruction if it is applicable, it accurately states the law and is requested by a party.

Pursuant to MCR 7.302 (B)(3) defendant submits the trial court's pretrial presumption ruling and subsequent presumption/inference instruction at the close of trial involve legal principles of major significance to this state's jurisprudence as it relates to a party's duty to preserve evidence and the nature of the presumption/inference permissible in the event such evidence is not available at trial.

II. Pursuant to MCR 7.302 (B)(5) defendant submits the opinion of the Court of Appeals regarding the interpretation of the jury verdict form is clearly erroneous and will cause material injustice if not addressed by this Court. Further, the opinion of the Court of Appeals conflicts with numerous controlling federal court decisions which set forth the standard under which a jury may determine liability under the Locomotive Inspection Act and Safety Appliance Act. Defendant further submits the opinion of the Court of Appeals conflicts with the prior decision of this Court in *Harrington v. Velat*, 395 Mich. 359, 235 N.W. 2d 357 (1975) which holds that where the verdict of the jury is inconsistent and contradictory a new trial is required.

III. Pursuant to MCR 7.302 (B)(5), the opinion of the Court of Appeals affirming the admission of the opinion testimony of Dr. Lawrence Rapp was clearly erroneous and will cause material injustice if not addressed by this Court. Further, the opinion of the Court of Appeals conflicts with Michigan Rule of Evidence 702, MCLA §600.2955 and prior federal court decisions which set forth the foundational standard for the admission of opinion testimony.

IV. Pursuant to MCR 7.302 (B)(3) defendant submits whether attorney fees are recoverable under the FELA involves legal principles of major significance to this state's jurisprudence as it relates to the authority of a state court to award damages (in the form of attorney fees) under the guise of MCR 2.403, which are not recoverable otherwise in a federal cause of action. Further, the opinion of the Court of Appeals conflicts with prior decisions of the United States Supreme Court in *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 108 S.Ct. 1837, 100 L.Ed. 2d 349 (1988) and *Norfolk and Western R. Co. v. Liepelt*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed. 2d 689 (1980) which hold that attorney fees may not be imposed under state law in an action under the Federal Employers' Liability Act. Defendant submits the

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## **STATEMENT OF MATERIAL PROCEEDINGS AND FACTS**

### **I. PROCEDURAL HISTORY:**

Plaintiff's Complaint in this matter arose out of an unwitnessed accident that allegedly occurred on February 19, 1998 during the course of his employment with defendant, Consolidated Rail Corporation (Conrail). When plaintiff finally reported the incident the next day, he claimed to have injured his back while attempting to apply a handbrake on a locomotive. Plaintiff alleged defendant was negligent under the Federal Employers' Liability Act (FELA), 45 U.S.C. §51, *et seq.* and further that defendant had violated provisions of the Federal Locomotive Inspection Act (49 U.S.C. §20701 *et seq.*) and the Federal Safety Appliance Act (49 U.S.C. §20302).

Plaintiff's Complaint was filed on January 29, 1999 and defendant's Answer was served on March 11, 1999. On February 18, 2000 (ten months before trial) the trial court issued an Order that plaintiff was "entitled to a presumption that the handbrake being used by plaintiff on February 19, 1998 was defective because it was destroyed" [**Tab A**]. The trial court issued the foregoing Order despite the fact that defendant had provided a reasonable explanation for the unavailability of the handbrake.

The case proceeded to trial on November 13, 2000. Plaintiff was permitted by the trial court to repeatedly advise the jury that the court had earlier ruled the handbrake was "presumed defective" because it had been "destroyed" by defendant. At the conclusion of the case, the trial court belatedly instructed that the jury may infer the evidence relating to the handbrake was unfavorable to defendant. The instruction failed to include, despite defendant's explanation for the absence of the handbrake, the critical last portion of SJ1 2d 6.01 (c), "if you believe that no reasonable excuse for defendant's failure to produce the evidence has been shown."

On November 22, 2000 the jury returned a verdict in favor of plaintiff in the amount of \$800,000. On the verdict form, the jury concluded **defendant was not negligent** under the FELA and that the handbrake “**was in proper condition and safe to operate without unnecessary danger of personal injury**” as mandated by the Federal Locomotive Inspection Act. The jury inexplicably found, however, that the handbrake was not “efficient” as required by the Federal Safety Appliance Act [**Exhibit 1**].

On January 5, 2001 a Judgment on the jury’s verdict was entered by the trial court [**Tab B**]. On January 19, 2001 the trial court extended the time for the filing of defendant’s post-trial motions to February 15, 2001. On February 2, 2001, the trial court granted plaintiff’s motion to tax costs, including attorney fees under MCR 2.403, and on March 16, 2001, an order to that effect was entered by the court [**Tab C**]. On May 10, 2001, the trial court denied defendant’s motion for new trial, or in the alternative, judgment notwithstanding the verdict [**Tab D**].

On August 7, 2003 the Michigan Court of Appeals in an unpublished per curiam opinion affirmed the trial court, except to remand the case for a reduction of the case evaluation sanctions attributable to paralegal billings [**Tab E**].

## **II. OPERATION OF THE LOCOMOTIVE HANDBRAKE:**

The locomotive involved in plaintiff’s complaint incident (8181) was equipped with a standard locomotive handbrake located near the front nose of the locomotive. A handbrake is used to secure a locomotive in place on defendant’s track anytime the locomotive is left unattended and is applied by operating the brake lever in an up and down arc similar to a water pump handle one might see on a farm [TR Vol. VII at 55-57]. A photograph of an individual operating the same type of locomotive handbrake as operated by plaintiff is attached as **Exhibit 2**.

As a handbrake lever is operated in the normal, controlled upward arc movement, a chain that runs from the handbrake assembly to the brake mechanism begins to tighten. The employee then lowers the brake handle in a downward arc with little or no tension on the lever, before beginning the next upward application. As a handbrake is operated, the controlled upward movement of the brake lever slowly develops increasing tension as the chain tightens [TR Vol. III at 149-153]. Once a handbrake is applied, a completely separate lever must be used to release the handbrake by pulling up on the release lever that disengages a “catch” holding the chain in place, allowing it to unwind [TR Vol. III at 154]. A photograph showing the separate application and release levers of a handbrake of the same type used by plaintiff is attached as **Exhibit 3**.

During the period of time leading up to plaintiff’s claimed February, 1998 accident, the maintenance of locomotives at defendant’s Bryan, Ohio rail yard was performed by Raymond Chandler, Jr., a locomotive machinist stationed at the railroad’s Elkhart, Indiana locomotive maintenance facility. Mr. Chandler would typically travel to the Bryan, Ohio yard approximately twice per week to perform any necessary locomotive maintenance [TR Vol. IV at 49]. Occasionally the chain which runs between the handbrake assembly and the brake mechanism requires the repair of one or more links, accomplished through the use of a u-shaped device the same size as the surrounding links, which reconnects the two ends of the chain [TR Vol. III at 159-161]. Such a device was referred to during the trial as either a repair link or clevis [TR Vol. III at 133]. The undisputed testimony by Mr. Chandler, as well as other witnesses, was that the above described repair of a handbrake chain through the use of a repair link was a practice approved by the Federal Railroad Administration (which regulates railroad operations) [TR Vol. III at 159-161].

### **III. SYNOPSIS OF COMPLAINT ACCIDENT:**

Plaintiff, William Ward, claimed his accident occurred at approximately 7:15 p.m. on February 19, 1998 during his employment by defendant, Conrail as a locomotive engineer at the railroad's yard in Bryan, Ohio [TR Vol. IV at 148,151-152]. Plaintiff's claimed accident was not witnessed and he failed to report the alleged incident to defendant's trainmaster, Thomas Barr, until the following day, approximately one hour after he had commenced work [TR Vol. VI at 79,84; TR Vol. IV at 157]. Plaintiff alleged that he was attempting to apply the handbrake on his locomotive near the end of his work shift when the application lever of the handbrake purportedly came to a sudden stop in mid-arc/operation [TR Vol. IV at 151-152].

After plaintiff finally reported the alleged incident the next morning, extensive inspection and testing of the handbrake by trainmaster, Mr. Barr and locomotive machinist, Raymond Chandler, detected neither a defect nor any operational difficulty with the handbrake [TR Vol. IV at 98, Deposition of T. Barr, pp. 57-58; TR Vol. IV at 56-58, 60-61, 63, 81-82, 85, 89].

The testing of the handbrake on February 20, 1998 by Raymond Chandler (which included the removal of the housing covering the chain and gear mechanism for the handbrake), specifically demonstrated that a repair link present in the handbrake chain could not have caused the application lever of the handbrake to jam [TR Vol. IV at 56-58, 60-61, 63, 76-81, 85-89]. As a result, both Mr. Barr and Mr. Chandler concluded the handbrake was safe for continued use by other employees of defendant and the handbrake (and locomotive) were returned to normal service [TR Vol. IV at 98; Deposition of T. Barr, pp. 57-58; TR Vol. IV at 58, 60-61, 63].

Plaintiff nevertheless contended at trial that the handbrake lever was caused to stop in mid-operation because of the presence of the repair link that had been used to repair the brake chain at some point prior to plaintiff's complaint accident [TR Vol. II at 153-154]. Plaintiff

speculated that the repair link was larger than the surrounding chain links and that either, the repair link was too large to enter a hole in the bottom of the brake housing or, alternatively, the allegedly oversized repair link became lodged in the handbrake gears, causing the lever to suddenly stop during application. No direct proof was offered by plaintiff to support either of the foregoing theories. Instead, plaintiff was allowed to inform the jury that the trial court had previously ruled that the handbrake was “presumed defective” because it had been “destroyed” by defendant.

#### **IV. CONDITION OF THE HANDBRAKE BEFORE FEBRUARY 19, 1998:**

The handbrake assembly on locomotive 8181 was the subject of an inspection and maintenance at defendant’s Elkhart locomotive maintenance shop on February 15, 1998 (only four days before plaintiff’s claimed incident) [TR Vol. III at 161-162]. The locomotive had been transported from the Bryan, Ohio yard where it had been in regular service to defendant’s Elkhart locomotive shop in connection with a federally required 92-day periodic inspection [TR Vol. III at 162-166]. In addition, in response to alleged difficulties concerning the subject handbrake, which purportedly had been expressed to defendant’s trainmaster, Thomas Barr, approximately one week prior to plaintiff’s complaint accident, the evidence demonstrated the trainmaster would have routinely communicated such concerns to the locomotive maintenance supervisor at Elkhart so they could be addressed at the same time as the routine 92-day periodic inspection [TR Vol. IV at 66].<sup>1</sup>

While locomotive 8181 was at defendant’s Elkhart locomotive shop on February 15, 1998, the subject handbrake was applied and released several times and the handbrake underwent

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<sup>1</sup>According to the trial testimony of plaintiff’s co-worker (Tim Parker), the difficulty concerning the handbrake, which he reported to trainmaster, Mr. Barr, prior to plaintiff’s accident allegedly involved the application lever jamming, similar to plaintiff’s claimed accident [TR Vol. III at 70, 72].

a federally required inspection by a certified locomotive machinist which demonstrated the handbrake was in proper operating condition [TR Vol. III at 162-166]. The handbrake chain was lubricated as part of the foregoing inspection and defendant's locomotive maintenance supervisor at the Elkhart locomotive facility, Jeffrey Chandler, testified that in the event there would have been a repair link in the handbrake chain which was larger than the surrounding links or which otherwise made the operation of the handbrake unsafe, the individual performing the inspection at the Elkhart yard on February 15, 1998 would have immediately undertaken to remedy the condition [TR Vol. III at 166]. As a result, it was the opinion of Jeffrey Chandler that the handbrake mechanism, including specifically the brake chain on locomotive 8181, was in compliance with all federal regulations (including the locomotive inspection and safety appliance act) as of four days prior to plaintiff's February 19, 1998 complaint incident [TR Vol. III at 162-166].

V. **PLAINTIFF'S OPERATION OF THE SUBJECT HANDBRAKE ON FEBRUARY 19, 1998:**

Plaintiff testified he had worked at defendant's Bryan, Ohio yard facility for the greater part of one year prior to his February 19, 1998 claimed accident. Plaintiff acknowledged he had worked on locomotive 8181 many times in the year before his alleged incident and that the only difficulty he had ever experienced with the handbrake was allegedly on one occasion, approximately one month before his claimed incident, when he had a claimed difficulty operating the **separate release lever** of the handbrake [TR Vol. IV at 141; TR Vol. VI at 101].

Plaintiff contended however, that his injury occurred not while attempting to **release** the handbrake as he had experienced one time in the past, but rather while attempting to **apply** the handbrake prior to leaving the locomotive at the end of his workday. Plaintiff alleged that during one of his upward operations of the brake lever, the handle unexpectedly came to a stop in mid-

arc/operation causing him to experience a “snap” in his back [TR Vol. IV at 151-152].<sup>2</sup> Plaintiff agreed he did not make any observation of the brake chain itself such that he was unable to state what allegedly caused the lever to stop as he claimed [TR Vol. IV at 151].

Plaintiff conceded at trial that he had never encountered any difficulty in his use of the entirely separate **application lever** and that, other than the one incident with the release lever, he had operated and released the handbrake assembly on locomotive 8181 numerous times without incident during the one year before his complaint incident [TR Vol. VI at 100-101]. More importantly, plaintiff testified that on February 19, 1998 he had been able to both apply and release the handbrake on locomotive 8181 approximately 4-5 times without difficulty during the course of his work, prior to his claimed incident [TR Vol. VI at 100-101]. The significance of the foregoing testimony was made evident by defendant’s locomotive repair specialists, Jeffrey Chandler and Raymond Chandler, who testified that plaintiff’s stated ability to operate the handbrake lever while applying the brake several times during the day of his claimed incident (as well as the continued ability to operate the handbrake lever the following day), demonstrated conclusively that a repair link could not have been the cause of any claimed “jamming” of the lever because such a condition would cause the handbrake lever to jam on each and every application [TR Vol. III at 104,157, 166-167; TR Vol. IV at 56-57, 58, 60-61, 63, 81-82, 85].

Plaintiff offered several conflicting versions as to when during the application process the brake lever allegedly came to a stop. Plaintiff initially indicated in a taped statement on February 25, 1998 (6 days after the incident) that the handbrake was essentially fully applied at the time of his accident:

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<sup>2</sup> It was plaintiff’s counsel who coined the term “jolt” in an effort to describe the alleged vague impact which purportedly resulted from the handbrake lever coming to a stop.

... Assumed the position to apply the mechanical handbrake on the 8181 and was in the process of the normal operation of the handbrake and as it came to **near completion where I felt it was fully applied** it stopped suddenly and in doing so and in lifting the handle when it stopped suddenly...(Emphasis Supplied).

...

**You make sure the handbrake is doing its job and that was all done and at the final pull** of the handbrake rather than just a blank brake it came into like a metal to metal stop and caught me short of the full range or motion of stroke... (Emphasis Supplied).

[TR Vol. VI at 94-96]. At his discovery deposition on September 3, 1999 plaintiff testified, however, that while he could not recall the number of pumps he had made with the brake lever before his claimed incident, **he was just starting to apply the handbrake lever and no appreciable tension** had developed in the brake chain and handle before the lever came to an unexpected stop [TR Vol. VI at 88-90, 92; Deposition of plaintiff, p. 189].

At trial, plaintiff initially testified on direct examination that he was “aggressively” ratcheting the chain and that it was “becoming tighter” and the “resistance was increasing” when the handbrake lever allegedly suddenly stopped [TR Vol. IV at 151-152]. On cross-examination, plaintiff completely abandoned his deposition testimony and agreed, consistent with his February 25, 1998 taped statement, that his claimed accident occurred on the “final pull” [TR Vol. VI at 96-97].

In support of plaintiff’s theory that the brake lever was caused to stop or jam by a too large repair link in the chain, plaintiff called a co-worker, T. R. Parker, who testified that on one or two occasions before plaintiff’s complaint incident he had purportedly experienced a difficulty in applying the handbrake on locomotive 8181 for reasons he could not explain [TR Vol. III at 81]. The co-worker alleged he had been able to free the brake lever by using a pry bar to release the chain from the mechanism [TR Vol. VII at 60-65]. Plaintiff also relied upon the deposition testimony of trainmaster, Thomas Barr, who indicated he was aware of one incident prior to

plaintiff's complaint accident in which there was a difficulty in **releasing** the handbrake (but not in the application of the handbrake) [TR Vol. IV at 98; Deposition of T. Barr, pp. 42-43].

Finally, plaintiff introduced the testimony of his retained expert, Alfred G. Reinig, who opined in the absence of any credible evidence that the claimed incident could have occurred as described by plaintiff.

Plaintiff's expert, Mr. Reinig conceded he was unable to identify one prior occasion in his 33 years in the railroad industry, including 21 years with the Federal Railroad Administration, where he had encountered a similar circumstance as described by plaintiff in this case [TR Vol. III at 46-47, 56]. Plaintiff introduced no evidence of any effort by Mr. Reinig to conduct any type of testing using a handbrake on another locomotive to support his "theory" that a too large repair link had caused the handbrake lever to jam, nor did plaintiff undertake to have Mr. Reinig utilize any model of a handbrake (including defendant's model which was present in the hallway outside the trial court) to explain the basis for his claims [TR Vol. III at 8-9].

The uncontroverted evidence established that an operator applying a handbrake in a proper manner would do so in a controlled, slow fashion and that as the tension on the brake chain increased, the upward applications of the brake lever would become successively slower until such time the operator was unable to lift the handle further with ordinary effort [TR Vol. III at 149-153; TR Vol. IV at 86-87; and TR Vol. VII at 65]. The evidence also demonstrated that the normal application of the handbrake could result in the brake becoming fully applied anywhere along the upward arc the brake handle would travel during operation [TR Vol. III at 150-152]. The evidence further demonstrated that, whether the brake handle came to an "unexpected" stop in mid-arc/operation while under no tension well before the brake was applied (as alleged at deposition by plaintiff), or the brake lever came to a stop in mid-arc/operation

because the handbrake was essentially fully applied (as claimed in his prior statement and at trial), an operator would not experience any type of “jolt” as described by plaintiff’s counsel, if the proper and required controlled force was being used to apply the handbrake [TR Vol. III at 145, 149-153; TR Vol. IV at 86-87, 92; and TR Vol. VII at 65]. In that regard, even plaintiff’s expert, Mr. Reinig, was unable to articulate for the jury how an operator could sustain a “jolt,” if he was applying the brake handle in a controlled fashion as required by defendant’s rules [TR Vol. III at 46-47, 56].

**VI. INSPECTION AND TESTING OF THE HANDBRAKE ON FEBRUARY 20, 1998:**

Although plaintiff was required by defendant’s rules to immediately report the occurrence of any claimed on the job injury (particularly one that involved equipment that would hold a locomotive in place), Mr. Ward departed defendant’s Bryan, Ohio yard on February 19, 1998 without reporting his claimed accident to either his conductor at the work location or advising any supervisor using the radio that was available to him [TR Vol. II at 79].

After plaintiff had been at work for approximately one hour on February 20, 1998, he reported to his supervisor, trainmaster, Thomas Barr, that he had purportedly encountered the previous day an operational difficulty with the application lever of the handbrake on locomotive 8181 [TR Vol. IV at 98; Deposition of T. Barr, p.12]. Mr. Barr’s deposition testimony, which was read into evidence, demonstrated that when he examined the handbrake on February 20, 1998 he did not visually observe any marks or other evidence on the brake assembly that would suggest how the brake handle could have allegedly stopped in mid-arc/operation as claimed by plaintiff [TR Vol. IV at 98; Deposition of T. Barr pp. 25-26]. Mr. Barr further testified that when he inspected and tested the handbrake on February 20, 1998 he determined that the handbrake was functioning properly and was safe for continued use by other employees of

defendant [TR Vol. IV at 98; Deposition of T. Barr, pp. 57-58]. Mr. Barr testified he had **never experienced** any occasion where the brake lever of a locomotive handbrake had come to an abrupt stop while **applying** the handbrake [TR Vol. IV at 98; Deposition of T. Barr, p. 57].

The handbrake assembly on locomotive 8181 was also inspected at approximately 11:55 a.m. on February 20, 1998 by locomotive machinist, Raymond Chandler, who was called to the yard on his day off [TR Vol. IV at 49]. Mr. Chandler testified that he applied and released the subject handbrake 6 to 10 times and on each occasion found the handbrake to be functioning properly. Mr. Chandler also testified that after removing the handbrake cover, he was specifically able to observe the presence of the repair link in the handbrake chain and took **no exception** to either the **size** of the repair link in comparison to the surrounding chain links or the **location** of the repair link in relationship to the handbrake gears [TR Vol. IV at 56-58, 60-61, 63, 76-81, 85-89].

Mr. Chandler testified unequivocally that the repair link was never any closer than approximately twelve (12) inches from the bottom opening of the handbrake housing as he visually observed the repair link on February 20, 1998 while applying and releasing the handbrake numerous times. In addition, Mr. Chandler testified that the position of the repair link on the chain twelve (12) inches from the location of the handbrake housing could not have materially changed more than several inches in the less than 12 hours since plaintiff's complaint accident (as a result of the movement of the locomotive a short distance before his inspection) [TR Vol. IV at 73-76, 81-84, 88-89]. Accordingly, Mr. Chandler testified that he also determined on February 20, 1998 the handbrake was reasonably safe for continued use by defendant's employees [TR Vol. IV at 58, 60-61, 63].

Raymond Chandler also testified that in connection with his routine day-to-day maintenance of all of the locomotives at defendant's Bryan, Ohio yard for a significant time before February 19, 1998, he had not received complaints from any train crew member, including plaintiff and his co-worker, T. R. Parker, regarding the operation of the handbrake on locomotive 8181 [TR Vol. IV at 65-70].

**VII. DISCARD OF THE HANDBRAKE BY DEFENDANT ON MARCH 11, 1998 IN THE REGULAR COURSE OF BUSINESS:**

Following the inspection and testing of the handbrake on February 20, 1998, which demonstrated that the handbrake was operating properly, the handbrake continued to be utilized by defendant's employees on a daily basis over the next three weeks [TR Vol. IV at 98; Deposition of T. Barr, pp. 43-44, 48]. On March 9, 1998 a difficulty with the separate release lever on the handbrake was reported and an inspection documented the fact that the brake holding the locomotive in place could not be released. Subsequently, the brake chain was disconnected so that the locomotive could be moved to defendant's Elkhart locomotive shop.

Defendant's locomotive maintenance supervisor, Jeffrey Chandler, testified that upon arrival at the Elkhart locomotive shop, the entire handbrake assembly, including the brake chain, was replaced and discarded on March 11, 1998 in the regular course of business consistent with standard maintenance practices [TR Vol. III at 168-170]. At the time Jeffrey Chandler performed the above maintenance on March 11, 1998, he was unaware that anyone had claimed to have sustained an injury while using the application lever on February 19, 1998 or that the entire handbrake assembly and chain had been carefully inspected and returned to service on February 20, 1998 [TR Vol. III at 101, 168-170].

Mr. Chandler testified that prior to replacement of the handbrake, he did not undertake to determine what had caused the handbrake to become non-functioning [TR Vol. III at 92, 101,

104, 168-170]. Mr. Chandler further testified that pursuant to normal practice, following replacement of the handbrake assembly, the “old” handbrake and brake chain were placed by the Elkhart shop in a bin for eventual return to the manufacturer [TR Vol. III at 101, 168-170]. In an unchallenged affidavit submitted to the trial court prior to the court’s February 18, 2000 presumption ruling, Mr. Chandler specifically stated there was no intentional effort on the part of defendant to deliberately destroy evidence relating to the handbrake [**Exhibit 4**, Affidavit of Jeffrey Chandler].

### **ARGUMENT**

#### **I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REGARD TO ITS PRETRIAL PRESUMPTION RULING AND PRESUMPTION/INFERENCE INSTRUCTION AT THE CLOSE OF TRIAL:**

##### **A. Given the Absence of Any Intentional Fraudulent Conduct and Intentional Destruction of Evidence by Defendant, Plaintiff Was Not Entitled to a Presumption the Handbrake Was Defective:**

##### **1. Standard of Review.**

To the extent the trial court’s ruling on this issue arises out of the court’s ruling on plaintiff’s motion for summary disposition (on February 18, 2000), appellate review of that decision is de novo. *Michalski v. Bar-Levav, M.D.*, 463 Mich. 723, 729; 625 N.W.2d 754 (2001). This issue was also raised in defendant’s motion for new trial and motion for JNOV and review of the trial court’s rulings on these motions is also de novo. *Meagher v. Wayne State University*, 222 Mich. App. 700, 708; 565 N.W. 2d 401 (1997). Likewise, to the extent the trial court’s error arises out of a misinterpretation of the law, review of that ruling is again de novo. *City of Jackson v. Thompson-McCully Co., LLC*, 239 Mich. App. 482, 487; 608 N.W.2d 531 (2000).

## 2. Discussion.

In *Trupiano v. Cully*, 349 Mich. 568, 570; 84 N.W. 2d 747 (1957), this Court discussed the general rule that the intentional spoliation or destruction of evidence by a party raises a presumption that the destroyed evidence would have been adverse to that party. In doing so, this Court recognized:

Such a presumption can be applied only where there was intentional conduct indicating fraud and a desire to destroy and thereby suppress the truth. Moreover, while the spoliation of evidence raises a presumption against the person guilty of such act, yet such presumption does not relieve the other party from introducing evidence tending affirmatively to prove his case, in so far as he has the burden of proof. The spoliation or suppression of evidence is a circumstance open to explanation.

349 Mich. 568 at 570 (citing 20 Am. Jur., Evidence, § 185, p. 191).

Subsequently, the Michigan Court of Appeals in *Lagalo v. Allied Corporation* (On Remand), 233 Mich. App. 514, 592 N.W. 2d 786 (1991), consistent with this Court's ruling in *Trupiano*, *supra*, held:

***Trupiano* thus stands for the proposition that the presumption that non-produced evidence would have been adverse applies only where there is evidence of intentional fraudulent conduct and intentional destruction of evidence.** (Emphasis supplied).

233 Mich. App. 514 at 520.

In *Widmayer v. Leonard*, 422 Mich. 280, 373 N.W. 2d 538 (1985), this Court explained that a presumption is a procedural device to be used by the trial court in determining whether a directed verdict is appropriate and that the jury should not be informed of the existence of the presumption.

Thus, to clarify this confusing area of the law, **this Court takes the opportunity today to hold that in so far as *Wood* appears to hold that the trier of fact must be instructed as to the existence of the presumption and allowed to make the necessary**

**inference (even in the face of rebutting evidence), it is no longer controlling precedent.** We are persuaded that instructions should be phrased entirely in terms of underlying facts and burden of proof. That is, if the jury finds a basic fact, they must also find that the presumed fact unless persuaded by the evidence that its non-existence is more probable than its existence.

**We so hold because we are persuaded that the function of a presumption is solely to place the burden of producing evidence on the opposing party. It is a procedural device which allows a person relying on the presumption to avoid a directed verdict, and it permits that person a directed verdict if the opposing party fails to introduce evidence rebutting the presumption.** (Emphasis supplied).

422 Mich. 280 at 288-289.

The Court of Appeals thereafter in *State Farm Mutual Automobile Ins. Co. v. Allen, et al.*, 191 Mich. App. 18, 477 N.W. 2d 445 (1991), reiterated the impropriety of informing the jury of a presumption.

The Supreme Court clarified this confusing area of the law in *Widmayer v. Leonard*, 422 Mich. 280, 373 N.W. 2d 538 (1985). It explained that MRE 301 is based on the “Thayer” theory of presumptions which describes a presumption as a procedural device which regulates the burden of going forward with the evidence. The presumption is dissipated once substantial evidence has been submitted by its opponents. *Widmayer*, 286-287, 373 N.W. 2d 538. The judge makes all determinations as to the existence of the presumption and need charge the jury only regarding the burden of proof and the effect of circumstantial evidence. *Widmayer*, 288, 373 N.W. 2d 538.

191 Mich. App. 18 at 22. Consistent with the foregoing and this Court’s ruling in *Widmayer, supra*, the Court of Appeals in *Allen* held:

**...Moreover, pursuant to *Widmayer*, it is improper for the judge to instruct the jury regarding the presumption once the defendant has presented evidence sufficient to rebut it.** (Emphasis supplied).

Mich. App. 18 at 23.

The February 18, 2000 Order by the trial court that plaintiff was “entitled to a presumption that the handbrake being used by plaintiff on February 19, 1998 was defective because it was destroyed” was erroneous in two respects. First, no evidence was presented at plaintiff’s motion for summary disposition (ten months before trial) that the defendant had engaged in any type of “intentional conduct indicating fraud and a desire to destroy and thereby suppress the truth.” *Trupiano, supra*, at 570-571. Second, any question regarding the existence of a presumption was eliminated once defendant presented evidence at the motion hearing which explained why defendant had discarded the handbrake in the regular course of business three weeks after plaintiff’s claimed accident. Consistent with the holdings in *Widmayer, supra*, and *Allen, supra*, defendant’s uncontroverted explanation as to why the handbrake was unavailable precluded any finding by the trial court that the handbrake was presumed defective.

In support of its position, prior to the February 18, 2000 motion hearing, defendant had submitted to the trial court the affidavit of Jeffrey Chandler who was involved in the replacement of the handbrake. Mr. Chandler explained in his affidavit that he did not engage in any intentional destruction of potential evidence when he replaced the handbrake and was unaware of any claimed injury concerning the handbrake in question. See **Exhibit 4**.

Defendant also provided the trial court with the deposition testimony of trainmaster, Thomas Barr and locomotive machinist, Raymond Chandler, the individuals who returned the handbrake to normal service after being unable to find any defect or other operational difficulty at the time of their inspection and testing of the handbrake on February 20, 1998 [TR Vol. IV; Deposition of T. Barr, pp. 57-58; TR Vol. IV at 56-58; 60-61, 63]. This testimony, coupled with the affidavit of Jeffrey Chandler, provided more than a reasonable explanation as to why

employees of defendant did not retain the handbrake when a documented difficulty with the separate release lever was found nearly three weeks after plaintiff's claimed accident.

It is noteworthy that the trial court made no attempt at the February 18, 2000 motion hearing to explain the court's rationale in concluding that a presumption was appropriate in the face of the evidence presented by defendant [See **Exhibit 5** at 11-15, Transcript of February 18, 2000 motion hearing; Record Entry No. 86]. In *Citizens Insurance Company of America v. Juno Lighting, Inc.*, 247 Mich. App. 236, 243; 635 N.W. 2d 379 (2001), the Michigan Court of Appeals observed that a trial court should conduct an analysis of the parties' arguments prior to imposing a sanction for a party's failure to preserve evidence. The trial court in this case conducted no such analysis prior to its conclusory and erroneous ruling that plaintiff was entitled to a presumption.

The trial court's error in regard to the pretrial presumption ruling was amplified when the trial court permitted plaintiff to advise the jury at crucial points of the trial that the trial court had already ruled the handbrake was presumed defective. In an effort to avoid this clear error, defendant requested in a motion in limine prior to the start of trial that the trial court reconsider its previous presumption ruling and to stay until the close of proofs any claim or argument by plaintiff that a presumption existed [TR Vol. I at 66-67].

Notwithstanding defendant's request, plaintiff was permitted to "instruct" the jury during his opening argument:

And even though they knew about the injury, they knew about these claims, the defect in this hardware, they destroyed they evidence. The railroad destroyed the evidence. They threw away the chain, they threw away the clevis, they threw away the entire handbrake even though they had this knowledge. **And it is for this reason that this Court has concluded there is a presumption in this case that this handbrake was defective**

**when Mr. Ward went to use it and got hurt on the evening of February 19, 1998.** (Emphasis supplied).

[TR Vol. II at 155]. Plaintiff also made reference to the trial court's presumption ruling during voir dire [TR Vol. II at 35-36] and plaintiff's closing argument [TR Vol. VII at 99].

Defendant was deprived of any chance of a fair trial with respect to the single most important issue in the case once the jury was informed by plaintiff, with the trial court's blessing, that the trial court had earlier ruled that the handbrake was presumed defective because it had been destroyed by defendant. Even had the trial court properly and completely instructed the jury consistent with SJI 2d 6.01 (c), it would have been insufficient to overcome the monumental prejudice to defendant resulting from the fact that the jury effectively had been "ordered" by the trial court the previous eight days of trial to presume the handbrake was defective.

In affirming the trial court in this case, the Court of Appeals misapplied the controlling caselaw. First, the Court of Appeals questioned the applicability of its prior decision in *Lagalo v. Allied Corp.* (On Remand), 233 Mich. App. 514, 520; 592 N.W. 2d 786, 789 (1999) [Tab E at 2], in which the Court of Appeals held consistent with this Court's ruling in *Trupiano, supra*, that a presumption is appropriate only if there is evidence of "intentional fraudulent conduct and intentional destruction of evidence." The Court of Appeals in this case went on to state that even assuming the applicability of *Lagalo*, "the trial court properly instructed the jury with regard to an inference and not with regard to an un rebuttable presumption" [Tab E at 2]. **Amazingly, the Court of Appeals completely ignored the prejudicial effect of the trial court's pretrial presumption ruling, repeatedly conveyed to the jury throughout the eight day trial, that the trial court had previously ruled the handbrake was presumed defective because of its destruction by defendant.**

Similarly, the Court of Appeals in this case appeared to recognize that a jury should not be informed of a presumption, consistent with this Court's holding in *Widmayer v. Leonard*, 422 Mich. 280, 373 N.W. 2d 538 (1985) and the Court of Appeals' ruling in *State Farm Mutual Automobile Ins. Co. v. Allen*, 191 Mich. App. 18, 477 N.W. 2d 445 (1991) [**Tab E at 2-3**]. Once again, however, the Court of Appeals failed to address the fact that the jury had been informed throughout the eight day trial of a prior "order" of the trial court to presume the handbrake was defective. Instead, the Court of Appeals focused on the trial court's incomplete presumption/inference instruction provided at the conclusion of the case noting only that the court did not "instruct" the jury on presumption [**Tab E at 2-3**].

The illogic of the Court of Appeals' position is self-evident. If, consistent with this Court's holding in *Trupiano, supra*, the absence of any "intentional fraudulent conduct" on the part of defendant precluded the existence of a presumption, plaintiff should have never been permitted by the trial court to relate to the jury that the handbrake was "presumed defective." Likewise, if pursuant to this Court's holding in *Widmayer, supra*, it was improper at the close of the proofs to "instruct" the jury regarding a "presumption," it would likewise be improper for the jury to be informed during the course of the trial that the court had earlier ruled a "presumption existed."

Nor can it be said, as suggested by the Court of Appeals, that plaintiff's repeated use of the term "presumption" during the trial was harmless given the Court's instruction that an attorney's arguments, statements and remarks were not evidence [**Tab E at 3**]. When plaintiff communicated to the jury that the unavailable handbrake was presumed defective, he was reinforcing what the trial court had previously ruled (although improperly) to be the law of the

case, namely that the court had ordered that the handbrake was presumed defective because it had been destroyed by defendant.

Notwithstanding the above semantical gymnastics by the Court of Appeals, it is clear that both the trial court and Court of Appeals failed to follow the mandate of this Court in *Trupiano*, *supra*, and *Widmayer*, *supra*, that a presumption is not to be related to the jury. Defendant submits the foregoing clearly erroneous ruling requires a new trial in this case.

**B. The Trial Court Committed Reversible Error in Failing to Completely Instruct the Jury Consistent With SJI 2d 6.01 (c):**

**1. Standard of Review:**

In *Case v. Consumers Power Co.*, 463 Mich. 1, 6; 615 N.W. 2d 17 (2000), this Court set forth the following standard for claims of instructional error.

We review claims of instructional error de novo. In doing so, we examine the jury instructions as a whole to determine whether there is error requiring reversal. The instructions should include all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them. Instructions must not be extracted piecemeal to establish error. Even if somewhat imperfect, instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury. [Citation omitted]. We will only reverse for instructional error where failure to do so would be inconsistent with substantial justice. [Citation omitted].

**2. Discussion.**

When a party so requests, a Court must give a standard jury instruction if it is applicable and accurately states the law. *Chastain v. GMC* (On Remand), 254 Mich. App. 576, 590; 657 N.W. 2d 804 (2002). See also MCR 2.516 (D)(2). In *Clark v. Kmart Corporation*, 249 Mich. App. 141, 640 N.W. 2d 892 (2002), the Court of Appeals held:

SJI 2d 6.01 (c) should be given where a question of fact arises regarding whether a party has a reasonable excuse for its failure to

produce the evidence, the court finds that the evidence was under the party's control and could have been produced by the party, and the evidence would have been material, not cumulative, and not equally available to the other party.

249 Mich. App. 141 at 147.

Assuming an adverse inference instruction was appropriate at all, the trial court committed reversible error in failing to completely instruct the jury consistent with SJI 2d 6.01 (c). At the conclusion of the case, the trial court initially remained committed to an instruction (over defendant's objection) that the jury could presume the handbrake was defective because it had been destroyed by defendant [TR Vol. VI at 210-211, 215]. Finally, and only at the off the record urging of plaintiff, the trial court adopted a handwritten instruction submitted by plaintiff which stated:

The Court made a determination that there was a presumption that the handbrake at issue was defective due to the fact that the handbrake clevis and chain were discarded by the defendant. The defendant railroad has come forward with some evidence to rebut this presumption. Accordingly, the law requires that I instruct you as follows:

Certain evidence relevant to this case, namely the handbrake, the clevis and chain, were not available at trial because they were destroyed while in the possession or in the control of the defendant. The Rules of Evidence provide that you, the jury, may infer that this evidence was unfavorable to the defendant.

[TR Vol. VIII at 8].<sup>3</sup>

The foregoing instruction by the trial court failed to accurately and completely set forth the language of SJI 2d 6.01 (c). The trial court failed to advise the jury that they may infer the missing handbrake was adverse to defendant only, "if you believe that no reasonable excuse for

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<sup>3</sup> Once again the trial court's prior improper presumption ruling resulted in the court making reference to a presumption in this instruction in violation of this Court's holding in *Widmayer*, *supra*.

failure to produce the evidence has been shown.” Consequently, the jury was afforded no alternative by the trial court, other than to infer that the “destroyed” handbrake was unfavorable to the defendant. There is no question that defendant had made the trial court aware of its position at the February 18, 2000 motion hearing [**Exhibit 5** at 7-10, 13-15; Record Entry No. 86] and again in a motion in limine prior to the start of trial [TR Vol. I at 66], that a reasonable explanation had been provided for the unavailability of the handbrake such that no adverse instruction was appropriate at all. Indeed, the trial court’s instruction recognized that defendant had “come forward with some evidence” to rebut the “presumption.” It is noteworthy that the “some evidence” presented by defendant at trial as to why the handbrake was unavailable was no different in form or substance than the evidence which was presented by defendant at the time of the February 18, 2000 motion hearing which nonetheless resulted in the trial court’s presumption ruling [**Exhibit 4**, Affidavit of Jeffrey Chandler; TR Vol. III at 101, 168-170].

In rejecting defendant’s argument on this issue, the Michigan Court of Appeals ignored the fact that defendant had at pages 12-13 of its Brief on Appeal cited this Court’s opinion in *Case v. Consumers Power Co., supra*, and MCR 2.516 (D)(2) as legal authority in support of defendant’s argument that, consistent with the evidence of defendant’s explanation for the unavailability of the handbrake, the trial court was required to instruct the jury consistent with SJI 2d 6.01 (c), the section of the standard instruction applicable to the facts in this case [**Tab D at 4**].

In addition, the Court of Appeals opined that defendant had failed to preserve this issue for appellate review on the basis defendant did not specifically request that the trial court read the last line of SJI 2d 6.01 (c) and that the foregoing instruction was not among the original proposed jury instructions submitted by defendant [**Tab D at 4**]. The foregoing statement by the

Court of Appeals misses the point. The Court of Appeals failed to recognize that in light of the trial court's pretrial ruling that the handbrake was presumed defective, there was no basis or obligation prior to the start of trial for defendant to submit a requested instruction (SJI 2d 6.01) regarding what **inference**, if any, was appropriate given the missing handbrake. The trial court had already ruled that the handbrake was **presumed defective** and this order was the law of the case at the start of trial. Indeed, the trial court remained convinced at the conclusion of the trial that it would instruct the jury to presume the handbrake was defective [TR Vol. VI at 210-211, 215].

Well after the parties had submitted their proposed jury instructions at the start of trial, the trial court finally indicated it would consider giving SJI 2d 6.01 [TR Vol. VI at 8]. Whether requested by plaintiff or defendant, the court was required to completely and accurately instruct the jury as to SJI 2d 6.01 consistent with the applicable section (c) of that instruction, namely that the jury may infer the evidence relating to the non-produced handbrake would have been adverse to defendant, if the jury were to "believe that no reasonable excuse for defendant's failure to produce the evidence has been shown." In regard to the foregoing, there is no question that defendant had expressed as far back at the February 18, 2000 motion hearing its position that a reasonable excuse had been provided. Likewise, defendant's position had been repeatedly stated during trial [TR Vol. I at 66; TR Vol. VI at 211-213; TR Vol. VII at 88; TR Vol. VIII at 26]. Finally, there is no doubt that the trial court had determined defendant had produced sufficient evidence to warrant the giving of SJI 2d 6.01 (c) in its entirety [TR Vol. III at 88-89].

Defendant would further note this Court may address an instructional error, even where no objection was made, where the instruction "pertains to a basic and controlling issue in a case." *Reisman v. Regents of Wayne State University*, 188 Mich. App. 526, 532; 470 N.W. 2d 678

91991). In the instant case, the trial court's failure to properly instruct the jury under SJI 2d 6.01 (c) was "manifestly unjust" requiring reversal by this Court. *Reisman, supra* at 532.

C. **A Failure to Produce Evidence Instruction Is Improper Where Equipment Involved in a Claimed Accident Has Been Returned to Regular Service After Being Found Free of Any Defect and the Equipment is Later Replaced For Other Reasons:**

1. **Standard of Review.**

To the extent the trial court's ruling on this issue arises out of the court's ruling on plaintiff's motion for summary disposition (on February 18, 2000), appellate review of that decision is de novo. *Michalski v. Bar-Levav, M.D.*, 463 Mich. 723, 729; 625 N.W.2d 754 (2001). This issue was also raised in defendant's motion for new trial and motion for JNOV and review of the trial court's rulings on these motions is also de novo. *Meagher v. Wayne State University*, 222 Mich. App. 700, 708; 565 N.W. 2d 401 (1997). Likewise, to the extent the trial court's error arises out of a misinterpretation of the law, review of that ruling is again de novo. *City of Jackson v. Thompson-McCully Co., LLC*, 239 Mich. App. 482, 487; 608 N.W.2d 531 (2000).

2. **Discussion.**

Defendant believes the question presented concerning this issue is one which has not been previously addressed by this Court or the Michigan Court of Appeals. Serious policy considerations compel that this Court consider whether in the context of a claimed accident a party is required to indefinitely preserve the involved equipment, to avoid later being charged with the destruction of evidence in the event the equipment is eventually modified or replaced for other reasons, even where post-accident testing of the equipment fails to demonstrate the presence of a defect and the equipment is returned to normal service.

As reflected above, the handbrake was found to be free of any defect at the time of a periodic inspection and maintenance on February 15, 1998 (four days before plaintiff's claimed accident). After plaintiff reported his claimed injury, the handbrake was again inspected and tested and since no explanation could be found to support plaintiff's claim that the handbrake application lever had somehow "jammed," the handbrake was returned to normal service and utilized by various employees of defendant on a daily basis during the next 19 days without incident [TR Vol. IV at 98; Deposition of T. Barr, pp. 43-44, 48].

This is not a case in which defendant immediately disposed of equipment determined to be defective or broken in an "investigation" of an accident. When a documented and different difficulty with the handbrake developed nearly three weeks later on March 9, 1998, the handbrake and locomotive were taken out of service and transported from defendant's Bryan, Ohio yard to defendant's Elkhart, Indiana locomotive maintenance facility [TR Vol. IV at 98; deposition of T. Barr, pp. 43-44, 48]. The uncontroverted evidence demonstrated that when the entire handbrake assembly and brake chain were replaced on March 11, 1998 in the regular course of business consistent with the standard maintenance practices of defendant, Jeffrey Chandler, the locomotive maintenance supervisor in Elkhart involved in replacing the handbrake was unaware of any prior claimed accident involving the handbrake [TR Vol. III at 101; 168-170].

There was no evidence introduced as to the specifics of the use (as well as the potential "misuse") of the handbrake by employees of defendant during the ensuing 19 days after plaintiff's claimed accident. Nor was there any evidence presented as to the specific nature of the operational difficulty found with the handbrake on March 9, 1998. The only known information concerning the condition of the handbrake on March 9, 1998 was the fact that

employees were unable to lift the completely separate release lever of the handbrake in order to release the brakes on the locomotive wheels.

At the time the locomotive and handbrake were taken out of service by trainmaster, Thomas Barr, on March 9, 1998, there was no reasonable basis for Mr. Barr to suspect that the operational difficulty with the release lever on that date had any relationship whatsoever to plaintiff's unwitnessed, claimed difficulty using the application lever on the handbrake nearly three weeks previously, particularly given the testing of the handbrake by both Mr. Barr and Raymond Chandler on February 20, 1998 which disclosed no evidence of any defect or other improper condition. Even assuming employees of defendant had the foresight on March 9, 1998 to set aside the handbrake in anticipation of a potential future lawsuit by plaintiff, no evidence was presented to suggest that the handbrake would have been substantially similar in condition at that time as compared to its condition on February 19, 1998.

It is apparently plaintiff's "theory" (adopted by the trial court and the Court of Appeals) that any time an individual reports an alleged injury involving some type of equipment, the party responsible for the equipment has an absolute duty to place the equipment in storage, regardless of its condition and regardless of the results of any inspection/testing of the equipment. Under the foregoing standard, a party which continued to use equipment involved in a claimed accident which had been found free of any defect (such as the instant case), would be subject to a charge of destruction of evidence in the event that equipment was modified or replaced at a future date. Defendant submits that it would be extraordinarily unreasonable and burdensome for this Court to adopt such a rule on preservation of evidence.

Although defendant is unaware of any existing caselaw directly on point, the following unpublished decisions of the Court of Appeals provide some guidance. In *Citizens Insurance*

*Company, et al. v. Detroit Edison, et al.*, 2001 WL 672 174 (Mich. App.) (2001), plaintiffs alleged that a fire which damaged the home of its insured was caused by power lines negligently maintained by defendant, Detroit Edison. Plaintiffs sought to have the jury instructed under SJI 2d 6.01 that defendant, Detroit Edison had destroyed the downed power lines subsequent to the house fire. In affirming the trial court's determination that plaintiffs were not entitled to such an instruction, the Court of Appeals held:

Here, there was no evidence presented to show that defendant's employees destroyed the downed power line purposely to deprive plaintiffs of the benefit of the evidence. Rather, the linemen who discarded the downed lines after removing them testified that they were not aware that a fire suspected of being electrical in nature had occurred in a nearby home, and that their disposal of the lines was in keeping with standard business practice. Thus, plaintiff's were not entitled to a presumption that the destroyed electrical lines would have been adverse to defendant that would have allowed them to avoid a directed verdict.

Further, the trial court did not abuse its discretion in ruling that plaintiff is not entitled to have the jury instructed under SJI 2d 6.01. *Ellsworth, supra*. The Court reasonably concluded that defendant's employees did not know, and had no reason to know, that the lines could be evidence relevant to a claim against the defendant. We thus distinguish this case from *Brener v. Kolk*, 226 Mich. App. 149, 160-161; 573 N.W. 2d 65 (1997), where this Court concluded that the plaintiff could be sanctioned for failing to preserve key evidence that she knew or should have known would be relevant to litigation.

2001 WL 672174 at 3 [**Exhibit 6**].

In *Parks v. K. Schuster Markets, Inc.*, 1996 WL 33357154 (Mich. App.) (1996), plaintiff was injured when the legs of a chair in the restaurant where she worked broke and the chair collapsed. In rejecting plaintiff's argument that she was entitled to an inference instruction based on the fact that defendant threw out the chair after the accident, the Court of Appeals stated:

However, such a presumption is only available when there has been a "deliberate destruction of evidence." *Andrews v. Kmart*

*Corporation*, 181 Mich. App. 666, 671; 450 N.W. 2d 27 (1989). **In *Andrews*, this Court concluded that where evidence had been destroyed ‘within the regular course of business’ (in that case, a tour book containing observations made during an inspection), no presumption was entitled in favor of the other party. (Emphasis supplied).**

1996 WL 33357154 at 2 [**Exhibit 6**]. While the Court in *Parks* noted that plaintiff had not yet reported an injury prior to the discard of the chair by defendant, the Court noted (similar to this case) that no request had been made by plaintiff to reserve the chair, no indication had been given by plaintiff of an intent to file lawsuit, and the chair was thrown out by defendant as part of the normal business practice of discarding broken chairs which could not be fixed.

In *Ross v. Dayton Hudson Corporation*, 1996 WL 33357912 (Mich. App.) (1996), defendant, Dayton Hudson was unable to produce at trial, in violation of a prior court order, photographs taken by a store employee at the time of plaintiff’s slip and fall accident. Defendant’s counsel explained at trial that he was unable to locate the photographs after checking his files and contacting the individual who allegedly took the photographs. In affirming the trial court’s denial of plaintiff’s request for an inference instruction under SJI 2d 6.01, the Court of Appeals noted:

The judge determined that no fraud had been committed. We find that the judge’s determination was substantiated by the facts placed before him with regard to the existence of the alleged photographs. The ruling did not constitute an abuse of discretion.

1996 WL 33357912 at 1 [**Exhibit 6**].

The plaintiff in *Opie v. Grace Hospital*, 2000 WL 33395296 (Mich. App.) (2000), sought an adverse inference instruction under SJI 2d 6.01 regarding emergency room records that had been lost subsequent to plaintiff’s treatment. In affirming the trial court, the Court of Appeals stated:

Even if it was under defendant's control, however, the fact that it was lost or misplaced was a reasonable excuse for the failure to produce the summary at trial. *Id.* Moreover, the emergency room summary would have been merely cumulative because a handwritten document was created to accommodate for it.

2000 WL 33395296 at 5 [**Exhibit 6**].

In the instant case, plaintiff clearly had alternatives available to him, such as utilizing a handbrake on another locomotive or the model handbrake defendant had at trial, which would have allowed plaintiff to fairly present his theory of the accident to the jury in the absence of the original handbrake. Based on the foregoing, a failure to produce evidence instruction is improper where equipment involved in an accident is inspected/tested and returned to normal service after no evidence of a defect has been found and the equipment is later modified or replaced for other reasons.

**II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO ENTER JUDGMENT IN FAVOR OF DEFENDANT OR IN THE ALTERNATIVE FINDING THAT THE JURY VERDICT WAS SO INCONSISTENT THAT A NEW TRIAL WAS REQUIRED:**

**1. Standard of Review.**

In reviewing a motion for JNOV, this Court examines the evidence up to the time of the motion in a light most favorable to the non-moving party and decides whether any question of fact existed. *Yacobian v. Vartanian*, 221 Mich. 25, 27; 190 N.W.2d 641 (1922). In reviewing the grant or denial of a motion for a new trial on the basis that the verdict was against the great weight of the evidence, the standard to be applied by this Court is whether the trial court abused its discretion. *Bosak v. Hutchinson*, 422 Mich. 712, 737; 375 N.W.2d 333 (1985).

**2. Discussion.**

Analysis of the Special Verdict Form, which the jury executed and returned on November 22, 2000 demonstrates that defendant, Conrail was entitled to entry of judgment in its favor as a

matter of law. **Exhibit 1.** In response to question number one on the verdict form, the jury found that the handbrake used by plaintiff, William F. Ward on February 19, 1998 “**was in proper condition and safe to operate without unnecessary danger of personal injury**” as required by the Federal Locomotive Inspection Act. In response to question number five on the verdict form, the jury determined that **defendant was not negligent**. In contrast with the foregoing, in response to question number two on the verdict form, the jury improperly found that the handbrake used by plaintiff on February 19, 1998 was not “efficient” as required by the Federal Safety Appliance Act.

In determining that the handbrake was “in proper condition and safe to operate without unnecessary danger of personal injury” under the Locomotive Inspection Act and that defendant was not “negligent” under the FELA, the jury was precluded as a matter of law from making any determination that the handbrake was not “efficient” under the Safety Appliance Act, and more particularly, that any such claimed inefficiency was a cause of injuries or damages sustained by plaintiff. The relationship of the foregoing federal statutes is discussed below.

### **Locomotive Inspection Act**

Pursuant to 49 U.S.C. § 20701 *et. seq.*, the Locomotive Inspection Act, formerly known as the Boiler Inspection Act (BIA) provides:

A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts or appurtenances - -

- (1) Are in proper condition and safe to operate without unnecessary danger of personal injury.<sup>4</sup>

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<sup>4</sup> The former BIA language stated a locomotive could be used only if “all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the act of service of such carrier without unnecessary peril of life or limb.”

With respect to plaintiff's claim under the Locomotive Inspection Act, the court instructed the jury:

Plaintiff alleges that at the time and place in question the defective condition of the handbrake was a cause in whole or in part of a plaintiff's injuries and consequential damages. Under the Federal Locomotive Inspection Act a railroad may use a locomotive on its line only when the locomotive and its parts are in proper condition and safe to operate without unnecessary danger of personal injury....

The Boiler Inspection Act (now the Locomotive Inspection Act) was an amendment to the FELA directed specifically toward the overall condition of the locomotive engine. "The BIA is a safety statute which is to be liberally construed to afford protection to railroad employees." *Oglesby v. Southern Pacific Transp. Co.*, 6 F. 2d 603, 606 (9<sup>th</sup> Cir. 1993) (citing *Lilly v. Grand Trunk Western RR*, 317 U. S. 481, 486; 63 S.Ct. 347, 87 L.Ed. 411 (1943)). The Act "imposes an absolute and continuous duty to provide safe equipment" on locomotives. *Richardson v. Consolidated Rail Corp.*, 17 F. 3d 213, 216 (7<sup>th</sup> Cir. 1994)(quoting *Urie v. Thompson*, 337 U.S. 163, 188; 69 S.Ct. 1018, 93 L. Ed. 1282 (1949)). Whether the locomotive is "in proper condition and safe to operate" is an issue of fact for the jury. *Gregory v. Missouri Pacific R. Co.*, 32 F. 3d 160, 161 (5<sup>th</sup> Cir. 1994) (citing *Lilly v. Grand Trunk Western R.R. Co.*, *supra*, 317 U.S. 481 at 489).

### **Safety Appliance Act**

The Federal Safety Appliance Act, 49 U.S.C. § 20302, states with respect to handbrakes:

- (a) Except as provided in subsection (c) of this section and section 20303 of this title, a railroad carrier may use or allow to be used on any of its railroad lines –
  - 1) a vehicle only if it is equipped with –
    - B) Secure sill steps and **efficient handbrakes**;  
...(Emphasis Supplied)

With respect to this issue, the Court instructed the jury:

Further, the plaintiff alleges that the defective condition of the handbrake on February 19 was a violation of the Federal Safety Appliance Act. Under the Federal Safety Appliance Act, a railroad may use on its line a vehicle only if it is equipped with efficient handbrakes. A vehicle includes a locomotive. Efficient means adequate in performance producing properly a desired effect. Inefficient means not producing or not capable of producing the desired effect, incapable, incompetent and inadequate. [TR Vol. VIII at 13, 27].

The foregoing definition of the term “efficient” was adopted by the Court in *Meyers v. Reading Co.*, 331 U.S. 477, 67 S.Ct. 1334, 91 L.Ed. 1615 (1947). Clearly, the term “efficient” contemplates the concept that the handbrake perform the task it was designed to accomplish, i.e. to secure the locomotive in place so that it would not roll down the track and there was no evidence that the handbrake failed to hold locomotive 8181 in place following its application by plaintiff. Nor, more importantly, was there any evidence to suggest that plaintiff was injured as a result of the locomotive not remaining in place, i.e. plaintiff was not run over by the subject locomotive. Plaintiff’s taped statement of February 25, 1998 which was introduced into evidence clearly demonstrated that as far as plaintiff was concerned, the handbrake had operated efficiently, “**you make sure the handbrake is doing its job and that was all done**” [TR Vol. VI at 94-96].

In his brief to the Court of Appeals, plaintiff suggested in a conclusory fashion that defendant could have met its absolute duty to provide a handbrake that was “in proper condition and safe to operate” as required under the Locomotive Inspection Act and yet, the handbrake could have still somehow been found to be “inefficient” resulting in injury to plaintiff. Plaintiff asserted with no factual or legal support that, “the jury may have concluded that the use of an oversized clevis [repair link] mending the chain did not, in and of itself, present an ‘unnecessary

danger of personal injury’ or render the handbrake ‘unsafe’ under the Locomotive Inspection Act, but that it nonetheless did not produce the desired effect as required by the Safety Appliance Act [Plaintiff’s Brief at 9]. In affirming the trial court [**Tab E at 5**], the Michigan Court of Appeals superficially adopted the foregoing argument of plaintiff and provided no analysis in an effort to explain how a handbrake which did not pose an “unnecessary danger of personal injury” could nevertheless cause plaintiff injury because of some “inefficiency.”

The fallacy of the Court of Appeals’ position is reflected by the definition of “unnecessary danger” (formerly unnecessary peril) discussed in *Banta v. Union Pacific R. Co.*, 362 Mo. 421, 242 S.W. 2d 34 (1951):

The words “unnecessary” and “peril” are words of everyday usage and common understanding. As used in this Act we see no mystery in them. “Unnecessary,” means that which is not required by the usual circumstances. “Peril” means an exposure to injury or destruction. **“Unnecessary Peril,” as used in the Act means an exposure to injury or destruction which is not required by the usual circumstances of the particular duty that the employee is required to perform, but which is an exposure to injury over and above that which is usually, ordinarily or necessarily incidental to the performance of the particular duty.** (Emphasis supplied).

302 Mo. 421 at 430.

If the handbrake lever in question occasionally jammed or stopped unexpectedly as suggested by plaintiff, such a condition would not fall within the parameters of “the **usual circumstances** of the particular duty the employee is to perform.” Instead, a handbrake that jammed unexpectedly on occasion would be precisely the type of event prohibited by the Locomotive Inspection Act because it would expose an employee to injury “over and above that which is usually, ordinarily or necessarily incidental to the performance of the particular duty.” Comparing the above definition of “unnecessary danger” (under the Locomotive Inspection Act)

to the Safety Appliance Act definition for “efficient,” it is abundantly clear that the two terms mean the same. Accordingly, the jury’s unanimous conclusion that the handbrake did not pose an “unnecessary danger” required the like finding that the handbrake was “efficient.”

Significantly, the Court of Appeals failed to address defendant’s argument concerning the import of the jury’s determination that the handbrake was “in proper condition” [Tab E at 5]. Notwithstanding the Court of Appeals’ effort to harmonize the jury’s verdict, there is no rationale explanation for the jury’s conclusion that the handbrake was “in proper condition” with a finding that it was “inefficient.” Assuming the handbrake was “inefficient” because it was “not capable of producing the desired effect (i.e., if as claimed by plaintiff it would occasionally jam), then under no stretch of the imagination can it be said that the handbrake was “in proper condition” as found by the jury. Moreover, the Court of Appeals failed to address defendant’s argument that, in light of the jury’s determination that the handbrake was “safe to operate” as required by the Locomotive Inspection Act, the jury could not subsequently conclude reasonably that some “inefficiency” in the handbrake under the Safety Appliance Act caused plaintiff’s injury [Tab E at 5].

Defendant respectfully requests that based upon the jury’s findings that defendant was not negligent and that the handbrake was “in proper condition” and “safe to operate without unnecessary danger of personal injury,” this Court enter judgment in defendant’s favor, with any “confusion” on the part of the jury regarding the term “efficient” explained by the trial court’s prejudicial and confusing rulings on the “presumption” issue.

In the alternative, defendant contends that the verdict of the jury is inconsistent thus requiring a new trial. In *Harrington v. Velat*, 395 Mich. 359, 235 N.W. 2d 357 (1975) this Court explained:

However, the general rule is that where a verdict in a civil case is inconsistent and contradictory, it will be set aside and a new trial granted.

235 N.W. 2d at 357. While a verdict should be harmonized if possible, when the intent of the jury can not be ascertained, a new trial should be ordered. *Beasley v. Washington*, 169 Mich. App. 650, 427 N.W. 2d 177, 180 (1988). In the event judgment is not entered for defendant, it is clear that the jury's verdict cannot be reconciled in favor of plaintiff and a new trial is required.

**III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO ENTER JUDGMENT FOR DEFENDANT OR IN THE ALTERNATIVE THE JURY'S VERDICT WAS AGAINST THE GREAT WEIGHT OF THE EVIDENCE IN REGARD TO THE ADMISSION OF EVIDENCE THAT PLAINTIFF'S SUBSEQUENT SURGERY AND CLAIMED DISABILITY WERE CAUSED BY HIS FEBRUARY 19, 1998 ACCIDENT:**

**1. Standard of Review.**

Rulings on the admission of evidence are ordinarily reviewed on the basis of whether or not the trial court abused its discretion. *Chmielewski v. Xermac, Inc.*, 457 Mich. 593, 614; 580 N.W.2d 817 (1998). However, as noted in *Merrow v. Bofferding*, 458 Mich. 617, 634 n 14; 581 N.W.2d 696 (1998), where the ruling on admissibility is based on an erroneous application of law, that review is de novo. The court in *Merrow* explained:

An error in the admission of evidence will be found if it affects a substantial right of a party. MRE 103. Further, such an error is not harmless if the error was prejudicial. An error in the admission or exclusion of evidence is grounds for granting a new trial if refusal to take this action appears inconsistent with substantial justice. MCR 2.613(A); *People v. Mateo*, 453 Mich. 203, 214; 551 N.W.2d 891 (1996).

458 Mich. 617 at 634.

This Court reviews de novo the denial of a motion for directed verdict. *Meagher v. Wayne State University*, 222 Mich. App. 700, 708; 565 N.W.2d 401 (1997). A motion for directed verdict should be granted when no factual questions exist upon which reasonable minds

may differ. *Id.* In reviewing a motion for directed verdict, this Court examines the evidence up to the time of the motion in a light most favorable to the non-moving party and decides whether any question of fact existed. *Hatfield v. St. Mary's Medical Center*, 211 Mich. App. 321, 325; 535 N.W.2d 272 (1995). The same standard of review applies to a motion for JNOV. *Yacobian v. Vartanian*, 221 Mich. 25, 27; 190 N.W.2d 641 (1922). In reviewing the grant or denial of a motion for new trial on the basis that the verdict was against the great weight of the evidence, the standard to be applied by this Court is whether the trial court abused its discretion. *Bosak v. Hutchinson*, 422 Mich. 712, 737; 375 N.W. 2d 333 (1985).

## **2. Discussion.**

The trial court committed reversible error in admitting the medical causation testimony of Dr. Lawrence Rapp who expressed the opinion that plaintiff's May 18, 2000 back surgery and subsequent disability from employment by defendant were causally related to plaintiff's February 19, 1998 claimed accident. Dr. Rapp's testimony demonstrated, however, the complete absence of any foundational basis to support such an opinion. First, Dr. Rapp conceded during his testimony the lack of any "temporal relationship" between plaintiff's claimed incident of February 19, 1998 and Dr. Rapp's later diagnosis of a herniated disc over two years later in March 2000. Second, Dr. Rapp acknowledged that he had no understanding whatsoever as to the "forces or mechanism" purportedly involved in causing plaintiff to injure his back.

The deposition testimony of five different doctors was presented at trial and a substantial number of medical records were introduced. However, the only evidence supporting plaintiff's claim that his May 2000 back surgery and disability from his employment at the railroad were caused by his February 19, 1998 accident was the opinion testimony of Dr. Lawrence Rapp.

Plaintiff was initially treated during the approximate three (3) months after his complaint incident by three (3) different physicians located in his home state of Indiana: Henry DeLeeuw, M.D., Troy Bergin, M.D. and Joseph Fortin, DO. The foregoing physicians testified at trial that plaintiff was suffering, at most, from a low back strain and that there was no evidence of any disc injury based upon both their respective clinical examinations, as well as an MRI performed in March 1998 [TR Vol. VI; Deposition of Dr. H. DeLeew, pp. 10-14, 24]; [TR Vol. V; Deposition of Dr. J. Fortin, pp. 9-14, 16, 30-31, 45, 47-48] and [TR Vol. V; Deposition of Dr. T. Bergin, pp. 9-13, 29, 42-44]. Each of the above physicians further testified that the only abnormality reflected on the MRI was that plaintiff had a degenerative back condition unrelated to his complaint accident [TR Vol. VI; Deposition of Dr. H. DeLeew, pp. 13-14]; [TR Vol. V; Deposition of Dr. J. Fortin, p. 44] and [TR Vol. III; Deposition of Dr. T. Bergin, pp. 9-13, 29, 42-44].

The evidence demonstrated that Dr. Rapp first saw plaintiff in October 1998 (nearly eight months after his alleged incident). Dr. Rapp provided no treatment at that time and did not recommend surgery. Indeed, Dr. Rapp concluded in 1998 that plaintiff had not sustained a herniated disc as a result of his February 19, 1998 incident. Dr. Rapp likewise agreed with plaintiff's initial treating physicians that the degenerative condition noted in the March 1998 MRI was not related to plaintiff's complaint incident [TR Vol. V; Deposition of Dr. L. Rapp, pp. 58, 61-65, 68, 72-75, 79].

Subsequent to Dr. Rapp's evaluation in October 1998, Dr. Rapp did not again see plaintiff until March 2000 (nearly 18 months later). In the interim, plaintiff had been released for a return to his unrestricted work at the railroad in June 1999 by his primary physician, Dr. Robert Levine, (who had been treating plaintiff since May 1998) [TR Vol. V; Deposition of Dr. L.

Rapp, pp. 59, 75]. Although plaintiff did not return to work (with his new employer Norfolk Southern) until November 1999, the evidence demonstrated that plaintiff had engaged in numerous strenuous tasks between June 1999 and November 1999 associated with plaintiff's construction of a new home [TR Vol. VI at 173-182]. Plaintiff had also worked as a locomotive engineer for two months between November 1999 and January 2000 [TR Vol. VI at 190-191].

**Dr. Rapp conceded on cross examination that he had no knowledge of plaintiff's strenuous activities during the 18-month period between his evaluation of plaintiff in October 1998 and the next time he saw plaintiff in March 2000** [TR Vol. V at 77-78]. The evidence established that Dr. Rapp did not recommend surgery for plaintiff's back until after a myelogram in March 2000 which indicated (for the first time) a herniated disc [TR Vol. V; Deposition of Dr. L. Rapp, pp. 65, 75, 77-78, 107]. The evidence indicated that plaintiff's herniated disc could have been the natural progression of his unrelated degenerative back condition reflected in the MRI of March 1998 [TR Vol. VI; Deposition of Joseph Fortin, p. 46]. The evidence also supported the conclusion that plaintiff's herniated disc was caused by some activity plaintiff had engaged in between the March 1998 MRI (at which time no herniation was noted) and the March 2000 myelogram (when plaintiff's herniated disc was first discovered), particularly given plaintiff's involvement in his home construction business between June and November 1999 [TR Vol. VI; Deposition of Dr. H. DeLeew, p. 63].

Notwithstanding the foregoing, Dr. Rapp on August 29, 2000 authored an opinion letter at the request of plaintiff's counsel (which opinion he repeated at trial) stating that plaintiff's May 18, 2000 back surgery and subsequent disability were caused by plaintiff's February 19, 1998 incident. While Dr. Rapp cited as the basis for his opinion the "temporal relationship between the onset of symptoms" and the "mechanism of injury" [TR Vol. V; Deposition of Dr.

L. Rapp, pp. 48-49, 109], Dr. Rapp's testimony clearly evidenced the fact that plaintiff's March 2000 herniated disc could have reasonably developed during the interim 18 months since Dr. Rapp had last examined plaintiff.

Q. As we talked about before, you have no idea what he was doing between the time you last saw him in October of 1998 and when you next saw him in March of 2000?

A. That is correct.

Q. At that point you recommended the - - what tests did you recommend at that point?

A. **A myelogram.**

Q. **Why did you recommend it at that point, when you hadn't recommended it before?**

A. **Because there was no need to recommend it before.**

Q. Well, what was the need to recommend it now?

A. **The fact that the last studies I had on this gentleman's back were two years old; from 1998. And a decision was going to be made to address this gentleman. I do not make surgical decisions on two year-old studies.**

Q. **That's because things can change in two years.**

A. **That is correct.**  
(Emphasis supplied)

[TR Vol. V; Deposition of Dr. L. Rapp at pp. 107, 78-78]. In fact, Dr. Rapp agreed that he was unable to state the origin of plaintiff's March 2000 disc herniation.

Q. **How do we know that that disc herniation was there prior to 2000?**

A. **Basically we don't know that it is there prior to the day of the myelogram.**  
(Emphasis supplied)

[TR Vol. V; Deposition of Dr. L. Rapp, p. 86]. Based on the foregoing, plaintiff failed to provide a sufficient foundation for any "temporal" opinion on the part of Dr. Rapp that plaintiff's March 2000 herniated disc was somehow caused by his February 1998 complaint incident.

Dr. Rapp's causation testimony was likewise deficient with respect to Dr. Rapp's lack of knowledge regarding the "mechanics" of plaintiff's alleged incident. The following testimony of Dr. Rapp is illustrative:

- Q. Could you tell me how much force he was using in raising the handle of the brake?
- A. I haven't the faintest.
- Q. Do you have any idea how heavy the handle was?
- A. I haven't the faintest.
- Q. Do you have any idea what position he was in when he was moving the brake?
- A. I haven't the faintest.
- Q. Do you have any other information, in terms of what he was doing at that particular time?
- A. Per my discussion with him, he was performing a strenuous process.

[TR Vol. V; Deposition of Dr. L. Rapp, p. 91]. It is clear that Dr. Rapp had no foundational basis to express an opinion that plaintiff's vaguely-described "strenuous process" of merely lifting a handbrake could somehow cause a herniated disc. Significantly, plaintiff's history to Dr. Rapp fails to even mention plaintiff's claim that he was injured when the handbrake lever purportedly came to a "sudden or unexpected" stop.

Admissibility of expert opinions is governed by MCLA 600.2955 and MRE 702. The statute and Court Rule require certain factors be considered before admitting expert testimony and basically is a codified version of the federal law which was initially set forth in *Daubert v. Merrill Dow Pharmaceuticals*, 509 US 579 (1993) and *Taylor v. Conrail*, 114 F3d 1189 (6<sup>th</sup> Cir. 1997). These factors include, scientific testimony, peer review, generally accepted methodology, known or potential error rate, and whether the opinion relied upon exists outside the context of litigation.

In *Taylor, supra*, the Sixth Circuit held the standard for the admission of expert testimony in FELA cases is controlled by the Federal Rules of Evidence and *Daubert*. In *Cartwright v. Home Depot, USA, Inc.*, 936 F. Supp 900 (MD Fla 1996), the court rejected plaintiff's expert testimony and stated as follows:

It is well-settled that a causation opinion based solely on a temporal relationship is not derived from scientific method and is

therefore insufficient to satisfy the requirements of FRE 702 ... The logical fallacy *post hoc ergo propter hoc* has been recognized for generations. The near exclusive reliance by plaintiff's experts on this fallacy further undermines any confidence that their opinions are the result of scientific method.

936 F. Supp at 906.

The trial court committed error in failing to grant defendant a directed verdict on this issue[TR Vol. VII at 89-90]. The trial court committed further error in failing to grant defendant's motion for JNOV or new trial [**Tab D**]. In affirming the trial court's admission of Dr. Rapp's opening testimony, the Court of Appeals, without analysis or explanation, stated "There was simply 'nothing novel, suspect, or unreliable' about Dr. Rapp's testimony concerning plaintiff's injury." Citing *People v. Stiller*, 242 Mich. App. 38, 55; 617 N.W. 2d 697 (2000) [**Tab E at 8**].

The opinion in *Stiller* does not address the foundational issue raised by defendant in this appeal. In *Stiller*, defendant argued that there was no scientific basis to support the opinion testimony of the physician in that case. More specifically, the defendant challenged the expert's interpretation of the data relied upon. In this case there was a **complete absence of any data** to support the opinion. Defendant demonstrated there was no foundation that would allow Dr. Rapp to relate the March 2000 disc herniation and subsequent disability to the incident of February 19, 1998 given the fact that: (1) Dr. Rapp had previously concluded in October 1998 a disc herniation was not present; (2) Dr. Rapp was unaware of plaintiff's activities in the interim between October 1998 and March 2000; (3) Dr. Rapp had no knowledge whatsoever as to the forces involved in plaintiff's claimed incident; and (4) Dr. Rapp conceded he was unable to state when the disc herniation had occurred.

Considering the foregoing facts upon which the trial court acted, defendant submits an unprejudiced person would say there was no justification for the admission of Dr. Rapp's opinion testimony. *People v. Rice* (On Remand), 235 Mich. App. 429, 439; 597 N.W. 2d 843 (1999).

**IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REGARD TO ITS POST-TRIAL RULING GRANTING ATTORNEY FEES TO PLAINTIFF WHICH ARE NOT RECOVERABLE IN AN ACTION UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT:**

With no real explanation, the Court of Appeals affirmed the trial court's grant of attorney fees in this matter under MCR 2.403. On February 2, 2000 the trial court granted plaintiff's motion for an award of costs and attorney fees (including paralegal charges) contrary to controlling federal law. On March 16, 2001, the trial court entered an Order granting plaintiff attorney/paralegal fees in the amount of \$64,592 [Tab C]. The Court of Appeals correctly held that the paralegal fees were not properly awarded, under the rationale of *Joerger v. Gordon Food Service, Inc.*, 224 Mich. App. 167, 568 NW2d 365 (1997) [Tab E at 13]. However, the Appeals Court misapplied or chose to ignore the governing Federal case law on the impropriety of awarding attorney fees in actions brought under the FELA, even when done under the veil of a state "procedural rule" [Tab E at 12-13].

**1. Standard of review.**

This issue involves a question of law and statutory construction and is therefore given de novo review on appeal. *City of Jackson v. Thompson-McCully Co., LLC*, 239 Mich. App. 482, 487; 608 N.W.2d 531 (2000). This issue also presents questions of Federal preemption, which are also reviewed de novo on appeal. *Konynenbelt v. Flagstar Bank*, 242 Mich. App. 21, 27; 617 N.W.2d 706 (2000).

## 2. Discussion.

Fundamental to the understanding and resolution of this issue is the basic premise that “State courts are required to apply federal substantive law in adjudicating FELA claims.” *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330 at 335, 108 S.Ct. 1837, 100 L.Ed.2d 349 (1988).<sup>5</sup> The uniform application of Federal substantive law applies not only to issues of liability but also to matters involving damages. As the Supreme Court in *Monessen, supra*, noted:

It has long been settled that “the proper measure of damages [under the FELA] is inseparably connected with the right of action,” and therefore is an issue of substance that “must be settled according to general principles of law as administered in the Federal courts.” (citations omitted).

486 U.S. 330 at 335. See also *Norfolk & Western R. Co. v. Liepelt*, 444 U.S. 490, 100 S.Ct. 755, 757, 62 L.Ed. 2d 689 (1980).

The issue of whether attorney fees may be recovered in an FELA case was directly addressed by the Supreme Court in *Norfolk & Western R. Co. v. Liepelt, supra*:

**The FELA, however, unlike a number of other federal statutes, does not authorize recovery of attorney’s fees by the successful litigant. Only if Congress were to provide for such a recovery would it be proper to consider them.** (Emphasis supplied.)

444 U.S. 490 at 495 (footnote omitted). Defendant is not aware of any case law interpreting the FELA which would allow the imposition of attorney fees as part of the overall award to plaintiff.

The Court of Appeals rationale that MCR 2.403 is not substantive but is rather a state procedural rule to encourage settlement and relieve the court’s congested docket [**Tab E at 12-**

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<sup>5</sup> This Court has also long acknowledged that the governing substantive law in an FELA case is federal case law. *Bement v. Grand Rapids & I. Ry.* 194 Mich. 64, 160 N.W. 424 (1916).

13], was flatly rejected in the context of the FELA by the Supreme Court in *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 108 S.Ct. 1837, 100 L.Ed.2d 349 (1988).

In *Monessen*, plaintiff had received a jury verdict of \$125,000.00. The trial judge then assessed so called “delay damages” of \$26,712.50, awarded under Pennsylvania Rule of Civil Procedure 238. The Pennsylvania court rule allows for prejudgment interest on any verdict in a personal injury case in which a plaintiff prevailed as “damages for delay.” Similar to Michigan’s case evaluation rule, these delay damages can be avoided if the defendant makes an offer of judgment and the verdict at trial does not exceed 125% of the offer.

In reversing the Pennsylvania Supreme Court, the U. S. Supreme Court first discussed the supremacy of Federal substantive law in FELA cases and concluded that because the FELA does not provide for recovery of prejudgment interest, such monies could not be awarded pursuant to the Pennsylvania court rule: “If prejudgment interest is to be available under the FELA, then Congress must expressly so provide.” 486 U.S. 330 at 339. Given the fact that prejudgment interest could be a “substantial part of the defendant’s potential liability,” the determination of the Pennsylvania Supreme Court that the rule was procedural and not substantive, was overturned by the Supreme Court.

The Pennsylvania courts cannot avoid the application of federal law to determine the availability of prejudgment interest under the FELA by characterizing Rule 238 as nothing more than a procedural device to relieve court congestion. In *Dice v. Akron, C.& Y.R.Co.*, 342 US 359, 72 S.Ct. 312, 96 L.Ed. 398 (1952), the Ohio courts had applied a state procedural rule in an FELA action that permitted the judge rather than the jury to resolve factual questions as to whether a release had been fraudulently obtained. We reversed on the ground that “the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere ‘local rule of procedure’ for denial in the manner that Ohio has here used.” *Id.*, at 363, 72 S.Ct., at 315. See also *Brown v. Western R. Co. of Alabama*, 338 U.S. 294, 298-299, 70 S.Ct. 105, 107-108, 94 L.Ed. 100 (1949). Similarly,

prejudgment interest constitutes too substantial a part of a defendant's potential liability under the FELA for this Court to accept a State's classification of a provision such as Rule 238 as a mere "local rule of procedure."

486 U.S. 330 at 336 (footnote omitted).

The decisions of the Supreme Court in *Monessen, supra*, and *Liepelt, supra*, compel the same result with respect to plaintiff's attempt to seek attorney fees under MCR 2.403 in this FELA case. The opinion of the Supreme Court in *Norfolk & Western R. Co. v. Liepelt, supra*, made it clear that under the substantive law governing the FELA, attorney fees may not be recovered by a successful litigant. Likewise, under the analysis in *Monessen, supra*, the provisions of MCR 2.403 allowing recovery of attorney fees cannot be construed as a mere procedural device. As this Court is aware, attorney fees awarded as a result of mediation may constitute a significant portion of a plaintiff's total recovery, sometimes even exceeding the damages on the underlying claim. The attorney fees awarded in this case of \$55,107.00 are more than twice the amount of the prejudgment interest sought in *Monessen*, and like the prejudgment interest in *Monessen*, would constitute a "substantial part" of defendant's liability.

The Supreme Court in *Monessen* also observed that the procedural penalties imposed by a state in an FELA action could not be of such a character as to influence a decision by a litigant on whether or not to proceed to trial. 486 U.S.330 at 336. The potential that an award of attorney fees under MCR. 2.403 might influence the decision of a party on whether or not to proceed to trial, like the delay damages under Pennsylvania Rule, provide yet an additional basis

to preclude such an award in an FELA case.<sup>6</sup>

Other cases since *Monessen* have recognized that state rules designed to encourage settlement cannot be applied in FELA actions. In *Lund v. San Joaquin Valley R.*, 31 Cal. 4<sup>th</sup> 1, 71 P.2d 770, 1 Cal. Rptr. 3d 412 (S. Ct. Cal., 2003), the California Supreme Court acknowledged that a California statute, which allowed for prejudgment interest on a verdict if a defendant rejected a settlement offer by plaintiff and failed to obtain a verdict more favorable than the offer, could not be applied to FELA actions given the holding in *Monessen*.

Congress enacted the FELA to achieve national uniformity in personal injury actions by railroad employees against their employers. . . . (citations omitted) That goal would be frustrated if an FELA plaintiff could recover prejudgment interest simply by filing their actions in state court rather than in federal court, where such recovery is precluded. Even if prejudgment interest could be considered procedural rather than substantive, “state procedure must give way if it impedes the uniform application of the federal statute essential to effectuate its purpose, even though the procedure would apply to similar actions arising under state law. (*McCarroll v. L.A. County, etc. Carpenters* (1957) 49 Cal.2d 45, 61-62, 315 P.2d 322)

1 Cal. Rptr.3d 412 at 422. See also, *Webster v. Oglebay Norton Co.*, 1995 WL 32628 (Ohio App. 1995), an unpublished Jones Act case, reaching an identical result [**Exhibit 6**].

In the face of *Monessen*, the Court of Appeals attempted to characterize MCR2.304 as a mere procedural device, designed to promote settlement [**Tab E at 12-13**]. The Court of Appeals further stated that *Norfolk & Western R. Co. v. Liepelt*, 444 U.S. 490, 495, 100 S.Ct. 755, 62 L.Ed. 2d 689 (1980) stood for the proposition that attorney fees are not needed to make

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<sup>6</sup> Nor is an award of attorney fees under the mediation rule analogous to the imposition of attorney fees as a sanction for violation of discovery rules or other improper conduct which involves the commission by a party of a discreet “wrong.” In this case the railroad merely exercised its right under federal law to a jury trial. This is not something for which defendant should be punished.

plaintiff whole and apparently are therefore not part of his damages, but merely a procedural penalty [**Tab E at 12-13**].

First, the *Liepelt* opinion only states that as a general rule attorney fees are not usually a part of damages that can be recovered, citing the general “American Rule.” The Court in *Liepelt* pointed out that Congress has enacted a number of statutes that do allow for an award of attorney fees, such as federal civil rights legislation, but that until Congress specifically provides for attorney fees in an FELA action, an award to plaintiff could not include attorney fees. *Id.* Rather than support the Court of Appeals opinion, the language cited in *Liepelt* confirms Conrail’s position that attorney fees may not be awarded by a state court in an FELA case, even under the guise of a “procedural penalty.”

The Court of Appeals next urges that “because the FELA does not include such settlement provisions,” MCR 2.403 merely “supplements the federal statute,” citing, *X v. Peterson*, 240 Mich. App 287, 289-290: 611 N.W.2d 566 (2000) [**Tab E at 13**]. However, it is precisely because the FELA does not provide for attorney fees as a “settlement provision,” that a state procedural rule cannot be allowed to supplement the FELA. The *Peterson* case cited by the Court of Appeals involved plaintiffs who obtained a judgment in an action brought under 42 U.S.C. §1983 when both parties accepted the case evaluation award.

When the *Peterson* plaintiffs sought attorney fees pursuant to 42 U.S.C. §1988 (arguing the Michigan case evaluation rule should not effect their right to attorney fees under this federal statute), the Court of Appeals held that because the federal substantive law allowed the parties to waive the collection of attorney fees as part of a settlement, plaintiffs (by accepting the case evaluation award) had agreed to waive their right to attorney fees under the federal statute (which were a part of plaintiff’s damages) and instead, substitute an award of attorney fees under

MCR 2.403. The *Peterson* case does not stand for the proposition, as suggested by the Court of Appeals, that a state court may unilaterally add monetary damages such as attorney fees to a plaintiff's award, in a federal cause of action where Congress has not specifically provided for those types of damages.

The remaining position of the Court of Appeals that defendant made no attempt to "opt out" of case evaluation is likewise without merit and misses the point. Defendant had no objection to participating in the case evaluation process as a means of exploring the possible resolution of this case as an alternative to trial. Indeed, defendant would agree that the governing federal law and the FELA does not provide a basis to avoid participating in a mechanism of alternative dispute resolution, such as case evaluation. However, defendant had neither the obligation, nor any reason to raise an objection concerning the process until after trial, when defendant's rights under the FELA came into conflict with plaintiff's request for an award of attorney fees under MCR 2.403. Consistent with the Supreme Court rulings in *Monessen* and *Liepelt*, the trial court's award of attorney fees (which totaled \$55,107.00) must be reversed.

**RELIEF REQUESTED**

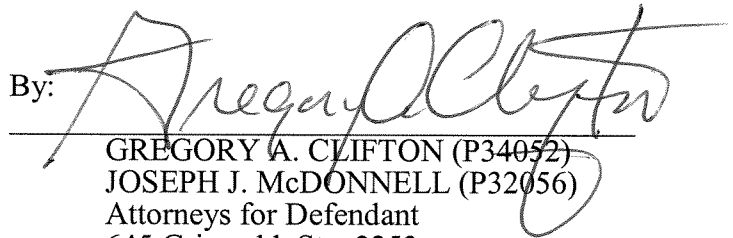
Defendant, Consolidated Rail Corporation, respectfully requests pursuant to MCR 7.302 (F) that this Court reverse the unpublished per curiam opinion of the Court of Appeals dated August 7, 2003 (except with regard to the ruling eliminating paralegal fees) and enter judgment in favor of defendant, or alternatively, grant defendant a new trial on all issues.

Respectfully submitted,

DURKIN, McDONNELL, CLIFTON  
& O'DONNELL, P.C.

DATED: August 28, 2003

By:

A handwritten signature in dark ink, appearing to read "Gregory A. Clifton", is written over a horizontal line. The signature is fluid and cursive.

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